A

MOHD YUSRI MANGSOR & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
DAVID WONG DAK WAH JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEALS NO: A-05-344-12-2011 &
C A-05-345-12-2011]
21 APRIL 2014

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Conviction and sentence - Appeal against*
D *- Conflicting evidence of witnesses - Whether trial judge erred in accepting such evidence - Exclusivity of possession - Whether proved - Surrounding circumstances - Whether caused suspicion against appellants - Whether suspicion alone sufficient to form basis of conviction - Whether conviction sustainable*

E

EVIDENCE: *Witness - Conflicting evidence - Material contradictions - Whether testimony of witness reliable - Credibility and reliability of evidence - Whether raised serious doubt - Whether trial judge erred in accepting evidence of witness*

F ***CRIMINAL PROCEDURE:*** *Appeal - Appeal against conviction and sentence - Conflicting evidence of witnesses - Whether testimony of witness reliable - Whether trial judge erred in accepting evidence of witness - Whether appellate interference warranted - Whether conviction sustainable*

G This was an appeal against the decision of the High Court in finding the appellants guilty for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The facts showed that Zabidi ('SP5'), who came to meet the second appellant in a house ('the house'), saw the latter carrying gunny sacks from a Proton
H Iswara towards the back of the house. The second appellant called the first appellant, who was in the house with SP5 at the material time, to assist him in carrying the said sacks. Both appellants were seen dragging two gunny sacks each from the car towards the back of the house. Subsequently, both the appellants
I came into the house and one Mat Shah ('SP6') came shortly thereafter. At about 8pm, the raiding officer ('SP7') together with

his team ambushed the house. Nothing incriminating was found on both the appellants, SP5 and SP6. There was a chicken coop at the back of the house and SP7 found ten gunny sacks which contained slabs of cannabis weighing 83,866g in total. The High Court found the appellants guilty and sentenced them to death. Hence, this appeal. The appellants submitted, *inter alia,* that (i) the Proton Iswara was locked and was not in use; (ii) DW3 had possession of the keys to the said car; and (iii) the second appellant only returned to the house around 7.45pm and the house was subsequently raided. Further, it was argued that the trial judge erred in holding that the prosecution had succeeded in establishing a *prima facie* case against the appellants by merely accepting the evidence of the prosecution witnesses, especially SP5, without subjecting them to a maximum evaluation. On the other hand, the prosecution argued that the appellants were in possession of the offending drugs since they were seen carrying the gunny sacks from the Proton Iswara to the backyard.

Held (allowing appeal; setting aside decision of High Court) Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) There was no evidence to show that the second appellant was the tenant or the owner of the house and it remained doubtful as to whether the second appellant had access to the Proton Iswara. It was also not proven that the second appellant had possession of the car keys. Whether the keys seized by SP7 were the car keys remained an unanswered question. Further, DW3 stated that she was having possession of the car keys at the material time. (para 25)

(2) The court must take an overall view of the evidence of each witness. When the prosecution witnesses gave conflicting evidence on the material facts in issue, the trial judge must make specific findings on the point and in doing so, must give reasons for rejecting one version and accepting the other. Unless this was done, it was unsafe for the court to rely on any evidence before it. However, this was not done by the trial judge. Further, the credibility of the prosecution witnesses should be subjected to judicial evaluation in totality. When witnesses made inconsistent statements in their evidence, the testimony of such witnesses was unreliable and in the absence of special circumstances, no conviction could be based on the testimony of such witnesses. (para 25)

(3) The evidence of the prosecution's witnesses was not consistent. In relation to SP5's statement that both appellants were dragging the gunny sacks from the car to the backyard, the investigating officer ('SP9') confirmed that there were no drag marks or shoe print on the ground leading to the backyard. Further, SP5's evidence had materially contradicted and was seriously irreconcilable with the evidence of SP6, SP7 and SP9. This gave rise to serious doubt on the credibility and reliability of SP5's evidence. (para 25)

(4) To sustain a conviction for the offence of possession under the Act, the prosecution must prove exclusivity of possession. There was insufficient evidence to establish that the appellants had possession of the alleged drugs. The raiding officer and the investigating officer had admitted that others could easily gain access to the place as the main entrance and the house gate were not locked. (para 25)

(5) The prosecution had failed to establish a *prima facie* case. The surrounding circumstances, taken as a whole, would only cause suspicion against the appellants. However, suspicion alone was insufficient to form the basis of the conviction. On the facts, the prosecution had failed to establish its case beyond reasonable doubt and the appellants were entitled to benefit of this doubt. Hence, appellate intervention was warranted and the appellants were acquitted and discharged. (paras 5, 25-28)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang telah mendapati perayu-perayu bersalah bagi kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Fakta menunjukkan bahawa Zabidi ('SP5'), yang datang ke sebuah rumah ('rumah itu') untuk berjumpa dengan perayu kedua, telah melihat perayu kedua mengangkut beberapa karung guni dari sebuah kereta Proton Iswara menuju ke belakang rumah itu. Perayu kedua memanggil perayu pertama, yang pada masa itu sedang berada di dalam rumah bersama-sama dengan SP5, untuk menolong perayu kedua mengangkut karung guni tersebut. Kedua-dua perayu kelihatan mengheret dua karung guni setiap seorang dari kereta tersebut menuju ke belakang rumah tersebut. Kemudian, kedua-dua perayu memasuki rumah dan seorang yang bernama Mat Shah ('SP6') tiba sejurus selepas itu. Kira-kira pada

pukul 8 malam, pegawai serbuan ('SP7') bersama-sama dengan pasukannya telah menyerbu rumah itu. Tiada apa-apa yang mensabitkan dijumpai pada kedua-dua perayu, SP5 dan SP6. Terdapat reban ayam di belakang rumah itu dan SP7 menjumpai sepuluh karung guni yang mengandungi kanabis dengan berat 83,866g secara keseluruhannya. Mahkamah Tinggi mendapati perayu-perayu bersalah dan hukuman mati dijatuhkan terhadap mereka. Oleh itu, rayuan ini. Perayu-perayu menghujahkan, antara lain, bahawa (i) Proton Iswara dikunci dan tidak digunakan; (ii) DW3 mempunyai milikan kunci kereta tersebut; dan (iii) perayu kedua hanya kembali ke rumah kira-kira pada pukul 7.45 malam dan serbuan hanya berlaku selepas itu. Tambahan, adalah dihujahkan bahawa yang arif hakim khilaf dalam memutuskan bahawa pihak pendakwaan berjaya membuktikan satu kes *prima facie* terhadap perayu-perayu dengan menerima keterangan saksi-saksi pendakwaan, terutamanya SP5, tanpa membuat penilaian maksimum terhadap mereka. Sebaliknya, pihak pendakwaan menghujahkan bahawa perayu-perayu mempunyai milikan dadah tersebut memandangkan mereka dilihat mengangkut karung guni dari kereta Proton Iswara ke belakang rumah.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Tiada keterangan yang menunjukkan bahawa perayu kedua adalah penyewa atau pun pemilik rumah tersebut dan terdapat keraguan sama ada perayu kedua mempunyai akses kepada Proton Iswara. Tiada bukti yang menunjukkan bahawa perayu kedua mempunyai milikan kunci kereta tersebut. Sama ada kunci yang dirampas oleh SP7 merupakan kunci kereta tersebut kekal sebagai soalan yang tidak dijawab. Tambahan, DW3 menyatakan bahawa dia mempunyai milikan kunci kereta tersebut pada masa material.

(2) Pandangan menyeluruh perlu diambil oleh mahkamah terhadap keterangan bercanggah setiap saksi. Apabila saksi-saksi pihak pendakwaan memberi keterangan bercanggah terhadap fakta material, hakim bicara perlu membuat penemuan spesifik terhadap perkara tersebut dan dalam berbuat demikian, beliau perlu memberi alasan bagi penolakan satu versi dan penerimaan

yang lain. Jika gagal berbuat demikian, maka adalah tidak selamat untuk mahkamah bergantung kepada sebarang keterangan yang dikemukakan. Tambahan lagi, kebolehpercayaan saksi-saksi pendakwaan adalah tertakluk kepada penilaian kehakiman secara keseluruhannya. Apabila saksi-saksi membuat kenyataan yang tidak konsisten dalam keterangan mereka, testimoni saksi-saksi sebegitu tidak boleh disandarkan dan dalam ketiadaan keadaan khas, sebarang sabitan tidak boleh bergantung kepada keterangan saksi-saksi sebegitu.

(3) Keterangan saksi-saksi pendakwaan adalah tidak konsisten. Berkaitan dengan kenyataan SP5 bahawa kedua-dua perayu mengheret guni dari kereta ke belakang rumah itu, pegawai penyiasatan ('SP9') mengesahkan bahawa tiada tanda-tanda heret atau kesan kasut atas tanah menuju ke belakang rumah itu. Tambahan pula, keterangan SP5 mempunyai percanggahan material dan tidak boleh diselaraskan dengan keterangan SP6, SP7 dan SP9. Ini membangkitkan keraguan serius atas kebolehpercayaan dan kebergantungan terhadap keterangan SP5.

(4) Untuk mengekalkan sabitan bagi kesalahan pemilikan, pihak pendakwaan mesti membuktikan milikan eksklusif. Tiada keterangan mencukupi untuk membuktikan bahawa perayu-perayu mempunyai milikan dadah tersebut. Pegawai serbuan dan pegawai penyiasatan mengaku bahawa orang lain boleh memasuki kawasan itu memandangkan laluan utama dan pagar rumah tersebut tidak dikunci.

(5) Pihak pendakwaan gagal untuk membuktikan satu kes *prima facie*. Keadaan sekeliling, diambil secara keseluruhan, hanya akan membangkitkan keraguan terhadap perayu-perayu. Walau bagaimanapun, keraguan dengan sendirinya tidak mencukupi untuk membentuk asas sabitan. Berdasarkan fakta, pendakwaan gagal untuk membuktikan kesnya melampaui keraguan munasabah dan perayu-perayu layak menerima faedah keraguan ini. Oleh itu, campur tangan rayuan adalah wajar dan perayu-perayu dilepaskan dan dibebaskan.

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***

Choo Yoke Choy v. PP [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43 SC ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***

Kumaran Sappani v. PP [2011] 3 CLJ 251 FC ***(refd)***
Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
Mohamad Yazri Minhat v. PP [2003] 2 CLJ 65 CA ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ 265 SC ***(refd)***
Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd [2012] 4 MLJ 149 CA ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Fom It Cheong [1991] 3 CLJ 524; [1991] 1 CLJ 160 HC ***(refd)***
PP v. Johar Mustafa [2004] 5 CLJ 187 HC ***(refd)***
PP v. Kang Ho Soh [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557 HC ***(refd)***
PP v. Lai Ah Bee [1974] 1 LNS 119 HC ***(refd)***
Saludin Surif v. PP [1997] 3 CLJ 529 CA ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)

Other source(s) referred to:
Sir John Woodroffe and Syed Amir Ali's Law of Evidence, 18th edn, vol 1, p 471

For the appellants - P Ravee; M/s P Ravee & Co
For the prosecution - Nurulhuda Nur'ain Mohd Nor, DPP

[Appeal from High Court, Taiping; Criminal Trial No: 45A-02-2010]

Reported by Kumitha Abd Majid

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] This appeal is directed against the judgment dated 18 November 2011 passed by the High Court at Taiping, Perak wherein the High Court found the appellants guilty for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the DDA1952") and sentenced them to death.

[2] Aggrieved, the appellants lodged this appeal to challenge the said impugned conviction and sentence.

[3] The charge against the appellants reads as follows:

> Bahawa kamu pada 26 Julai 2009 jam lebih kurang 8.00 malam di sebuah rumah alamat di No:C1 248, Kampung Changkat Ibol, Bukit Gantang, 34850 Changkat Jering, Taiping di dalam Daerah Larut, Matang dan Selama di dalam Negeri Perak, telah didapati mengedar dadah berbahaya iaitu 83,866 gram Cannabis dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[4] We have heard learned counsel for the appellants and learned Deputy Public Prosecutor ("DPP") at some length. We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (See *Perembun (M) Sdn. Bhd. v. Conlay Construction Sdn. Bhd.* [2012] 4 MLJ 149, (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA): [1996] 4 CLJ 545 (CA)).

[5] Having scrutinised the entire evidence adduced before the court, we are of the considered opinion that this is a case in which appellate intervention is warranted. Therefore, we unanimously allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellants are acquitted and discharged.

[6] We now give our reasons for so deciding.

Salient Facts

[7] The salient facts forming the basis for the conviction and sentence of the appellants was that on 26 July 2009, Zabidi bin Abdullah (SP5), a disabled person, went to a house at No: C1 248, Kampung Changkat Ibol, Bukit Gantang, Changkat Jering, Taiping ("the said house"), to meet the second appellant. They then travelled to Juru in SP5's car and reached back to the said house at about 7pm. According to SP5, when they arrived at the house, a silver-coloured Proton Iswara NBW7795 was parked at the porch, and a Datsun AAD7355 was parked at the garage located at the side of the house.

[8] On arrival, there was another Proton Iswara which followed SP5's car into the compound and stopped at the garage behind the Datsun AAD7355. SP5 saw the second appellant spoke to the person in the car. The car left moments later.

[9] SP5 was wheeled inside the house by the first appellant. SP5 took some Syabu while inside the living room. Both SP5 and the first appellant were watching the television programme when the second appellant came in and told SP5: "duduk sat, saya nak pergi hantar kereta".

[10] The second appellant returned 20 minutes later with the Proton Iswara Aeroback and parked the car at the garage. According to SP5, the second appellant did not come into the living room after 20 minutes. SP5 then turned towards the window and saw the second appellant carrying a gunny sack from the car towards the back of the house.

[11] After a while, the second appellant still did not come into the living room. SP5 then turned towards the window and saw the second appellant carrying another gunny sack on his back to the back of the house. SP5 asked the second appellant what was in the sack in which the second appellant replied: 'makanan ayam'.

[12] SP5 heard the second appellant called out to his brother for help to carry the gunny sacks. Both appellants were seen dragging two gunny sacks each from the car towards the back of the house. Subsequently, both appellants came into the house. According to SP5, Mat Shah (SP6) came shortly afterwards.

[13] At about 8pm, the police raided the house. According to the raiding officer, ASP Balasubramaniam (SP7), his team ambushed the said house. The gate was wide open so was the door of the said house.

[14] Nothing incriminating was found on both appellants, SP5 and SP6. A further search was conducted outside the house in the presence of the four arrested persons. There was a chicken coop at the back of the house and SP7 found ten gunny sacks covered by blue canvas: eight sacks were in white, one in yellow and another one in green. All the sacks were tied at the mouth and had the word 'THAILAND' written on them. A total of 91 slabs of cannabis wrapped in transparent plastic and aluminium foil were found in those sacks.

[15] Puan Nor Hazili binti Aznan (SP4), a government chemist, had conducted the chemical analysis and confirmed those slabs to be cannabis weighing of 83,866g in total.

The Defence Case

[16] Both the appellants denied carrying the gunny sacks from the car. The second appellant's evidence was that he left the house to have dinner with one Fadil, who drove a white Honda. He came back to the said house at about 7.45pm.

[17] The first appellant's evidence was that at about 4pm, he saw his brother, the second appellant, spoke to the driver of a red Honda. The second appellant then left in the red Honda and returned at about 7pm. The second appellant then asked him to wheel the driver (SP5) into the house. When he went out to the front porch, he saw a white Honda and a silver-coloured Proton Iswara inside the house compound. The second appellant told him that he was going out for dinner, then left the house in the white Honda.

[18] The first appellant said that he was chatting with SP5 in the living room. SP6 arrived on a motorcycle and asked for the second appellant. The first appellant informed SP6 was out having dinner. The second appellant came back around 7.45pm. The house was subsequently raided.

[19] The first appellant said that the Proton Iswara NBW7795 parked at the porch was not in use. The car was locked and DW3, had possession of the keys. This was supported by DW3. She also told the court that the second appellant was not an occupier of the said house.

The Appeal

[20] Before us, the central plank of the appellants' argument was that the learned trial judge erred in law and in facts in holding that the prosecution had succeeded in establishing a *prima facie* case against both the appellants by merely accepting the evidence of the prosecution witnesses, especially SP5, at the face value without subjecting them to a maximum evaluation. It was submitted by learned counsel for the appellants that the evidence of the prosecution witnesses must not be accepted at face value. Their evidence have to be tested, scrutinised and evaluated to determine whether they suffer from any infirmities, gaps or contradictions of a kind resulting that the main ingredients of the offence are not proven. It is a test of credibility. The evidence has to be scrutinised properly and not perfunctorily, cursorily and superficially. If the evaluation of the evidence result in doubt in the prosecution's case, then a *prima facie* case had not been made out. (See *Magendran Mohan v. PP* [2011] 1 CLJ 805).

[21] According to learned counsel for the appellants, had the learned trial judge subjected the prosecution witnesses to a maximum evaluation and viewed the evidence from all angles, the learned trial judge would not have called the appellants to enter their defence. (See *Gooi Loo Seng v. PP* [1993] 3 CLJ 1, SC). Learned counsel for the appellants strongly urged this court to reverse the decision of the learned trial judge.

[22] In reply, learned DPP submitted that the learned trial judge accepted and believed the testimony of SP5. The reasons given by his Lordship for accepting and believing the testimony of SP5 may be summarised as follows:

(i) SP5 is a credible witness and had candidly admitted that he took drugs before he went to Juru and while he was at the appellants' house;

(ii) SP5 was not intoxicated as his conduct before and during the raid was very much sober and he was aware of his surroundings (See *Kumaran Sappani v. Public Prosecutor* [2011] 3 CLJ 251 (FC)); and

(iii) SP5 stated that he saw both appellants carrying those gunny sacks from the Proton Iswara to the backyard. Therefore, they were in possession of the offending drugs.

[23] In the course of the arguments, learned DPP had reminded us on the danger of interfering with the finding of credibility of a witness, which is primarily a matter for the trial judge, who had seen and heard the witnesses. (See *Dato' Mokhtar bin Hashim & Anor v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101).

Our Findings

[24] What constitutes possession is a question of law. But whether in a particular case someone is in possession of something is a question of fact. (See *PP v. Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ (Rep) 557; [1992] 1 MLJ 360 at p. 371). It is trite that to establish possessions for the purpose of the DDA 1952, the court has to consider two separate questions. Firstly, whether the accused was in possession of the offending drugs and secondly, whether the accused had knowledge of the offending drugs but not the nature thereof. (See *PP v. Abdul Rahman bin Akif* [2007] 4 CLJ 337; *Mohamad Yazri Minhat v. PP* [2003] 2 CLJ 65; *PP v. Johar Mustafa* [2004] 5 CLJ 187).

[25] We have scrutinised and considered the evidence adduced by the prosecution carefully and we are of the considered opinion that the prosecution had failed to establish a *prima facie* case against both appellants. Our reasons are as follows:

(a) It remains doubtful whether the second appellant had access to the Proton Iswara. SP6 had stated that when he arrived at the house at 7.40pm, he parked his motorcycle behind the Datsun AAD7735 in the garage. He had not seen the Proton Iswara. Photograph P2E taken by Razali bin Seman (SP1) showed that Proton Iswara NBW7795 was parked under the

porch at the time of the raid. There is no conceivable reason for the second appellant to reverse the car under the porch after he had unloaded the gunny sacks.

(b) The facts of being present in the living room at the time of raid, are insufficient for the purpose of proving that the second appellant was an occupier of the house. There is no evidence to show that the second appellant is the tenant or the owner of the said house. (See *PP v. Lai Ah Bee* [1974] 1 LNS 119; [1974] 2 MLJ 74; *PP v. Fom It Cheong* [1991] 1 CLJ 160; [1991] 3 CLJ (Rep) 524). Further, it was not proven that the second appellant was having possession of the car keys. Whether the keys seized by SP7 were the car keys remain an unanswered question. DW3 also stated that she was having possession of the car keys at the material time.

(c) Another evidential point relates to the issue whether the appellants were carrying the gunny sacks which contained the dangerous drugs. SP5 had stated that both appellants were dragging the gunny sacks from the car to the backyard. The investigating officer, SP9 had confirmed during cross-examination that there were no drag marks or shoe print on the ground leading to the backyard.

(d) SP5 stated that both the appellants came into the house after unloading the gunny sacks. SP6 came shortly afterwards. His evidence contradicted SP6's evidence when SP6 stated that when he arrived, the second appellant was not in the house and the first appellant had informed him that the second appellant had went out for dinner. The second appellant's defence that he went out for dinner and was sent home by Fadil in the Honda was further supported by SP7's evidence that it was reported by Inspector Ikhbal that a Honda car had dropped the second appellant in front of the house and left.

(e) SP5's evidence had material contradictions and was seriously irreconcilable with the SP6, SP7 and SP9's evidence on the material point. It is clear that the evidence of the prosecution's witnesses are not at all consistent. This give rise to serious doubt on the credibility and reliability of SP5's evidence. It is trite that when prosecution's witnesses have given conflicting evidence on material facts in issue, the trial judge before whom such evidence is led must make specific findings on the point and in so doing must give reasons for

rejecting one version and accepting the other. Unless this is done, it is unsafe for the court to rely on any evidence before it. Unfortunately, this was not done by the learned judge.

(f) It has to be stressed here that credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the learned trial judge. When witnesses makes inconsistent statements in their evidence either at one state or at two stages, the testimony of such witnesses is unreliable and in the absence of special circumstances, no conviction can be based on the testimony of such witnesses. On the other hand one cannot be unmindful of the proposition that Court cannot mechanically reject the evidence of any witness. With regard to appreciation of evidence in criminal cases it would be of importance to quote what Sir John Woodroffe and Syed Amir Ali had to say in their work on – *"Law of Evidence"*, 18th edn., vol. 1 at p. 471:

> No hard and fast rule can be laid down about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case. Where a witness makes two inconsistent statements in his evidence with regard to a material fact and circumstance, the testimony of such a witness becomes unreliable and unworthy of credence.

(g) Further, it is the paramount duty of the court to consider entire evidence of a witness brought on record in the examination-in-chief, cross-examination and re-examination. In other words courts must take an overall view of the evidence of each witness.

(h) Granted that the first appellant was the occupier of the house and the second appellant had visited the house frequently and the second appellant had also on previous occasions supplied small doses of drugs to SP6. But this evidence is insufficient to establish that they have possession of the alleged drugs. The raiding officer and the investigating officer had admitted that others could easily gain access to the place as the main entrance and the house gate were not locked. It is trite that to sustain a conviction for the offence of possession under the DDA 1952, exclusivity of possession must be proved by the prosecution. It is therefore incumbent on the prosecution to

discharge this burden. (See *Abdullah Zawawi bin Yusof v. PP* [1993] 4 CLJ 1; [1993] 3 MLJ 1; *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265; [1992] 1 MLJ 137; *Saludin bin Surif v. PP* [1997] 3 CLJ 529; [1997] 3 MLJ 317; *Lee Chee Meng v. PP* [1992] 1 CLJ (Rep) 168; [1992] 1 CLJ 345; *Choo Yoke Choy v. PP* [1992] 4 CLJ 1791; [1992] 1 CLJ (Rep) 43; [1992] 2 MLJ 632.

[26] The surrounding circumstances of this instance case, taken as a whole, would only cause suspicion against both the appellants. However, suspicion alone is insufficient to form the basis of the conviction. There was doubt in this case, the benefit of which it would have been safer to give to the appellants.

Conclusion

[27] Based on the evidence before us and with all the infirmities and the glaring discrepancies in the prosecution's case as discussed earlier, it is our considered opinion that the conviction was plainly unsafe having regard to the facts and circumstances of this case. When on overall view of the evidence is taken, the irresistible and inescapable conclusion one could arrive upon is that the prosecution has failed to establish its case beyond reasonable doubt and the appellants are entitled to benefit of this doubt, which entitles them to earn an acquittal from the charge.

[28] In the result, we allowed the appeal herein and set aside the conviction and sentence imposed on the appellants. Subsequently, the appellants are acquitted and discharged.